



ARKANSAS JUDICIARY

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Rule 55. Default.

(a) When Entitled. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, judgment by default may be entered by the court.

(b) Manner of Entering Judgment. The party entitled to a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against an infant or incompetent person. If the party against whom judgment by default is sought has appeared in the action, he (or if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings as it deems necessary and proper and may direct a trial by jury.

(c) Setting Aside Default Judgments. The court may, upon motion, set aside a default judgment previously entered for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) the judgment is void; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; or (4) any other reason justifying relief from the operation of the judgment. The party seeking to have the judgment set aside must demonstrate a meritorious defense to the action; however, if the judgment is void, no other defense to the action need be shown.

(d) Plaintiffs, Counterclaimants, Cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) When Presented. A motion for default judgment may be presented to the court in vacation and at any place in the district or circuit.

(f) Remand from Federal Court. No judgment by default shall be entered against a party in an action removed to federal court and subsequently remanded if that party filed an answer or a motion permitted by Rule 12 in the federal court during removal.

Reporter's Notes (as modified by the Court) to Rule 55: - 1. Rule 55 varies substantially from FRCP 55 and generally follows prior Arkansas law. This rule permits only the court to enter default judgment as opposed to the federal practice which permits the clerk to enter judgment in certain instances. Since court clerks in Arkansas normally provide only ministerial services, the judicial function of entering default judgments is left to the trial court itself.

2. Section (b) follows prior Arkansas law regarding the entry of a judgment against an infant or incompetent. No judgment by default may be entered against infants or incompetents under this rule whereas a default judgment may be entered under the Federal Rule where a representative has appeared. Also, where any defendant has appeared in an action, three

days notice must be given to him on an application for default judgment.

3. Section (b) also follows superseded Ark. Stat. Ann. 29-402 (Repl. 1962) which permits the trial court to take evidence or refer to a jury the question of damages or any other issue which the court, in its discretion, determined should be so submitted.

4. Section (c) retains the provision of superseded Ark. Stat. Ann. 29-401 (Repl. 1962), which permits a default judgment to be set aside for excusable neglect, unavoidable casualty, or other just cause.

5. Section (e) permits a party to apply for a default judgment at any time regardless of whether the court is in vacation and also permits an applicant to move for a default judgment within or without the county where the action is pending so long as the place is inside the overall circuit or chancery district wherein the action is pending.

Addition to Reporter's Note, 1990 Amendment. - Rule 55 has been substantially amended to liberalize Arkansas practice regarding default judgments. The revised rule, which reflects a clear preference for deciding cases on the merits rather than on technicalities, is intended to avoid the harsh results that often flowed from the previous version. Because the rule represents a significant break from prior practice, many cases decided under the old rule and the statute from which it was derived will no longer be of precedential value.

Under revised Rule 55(a), the entry of a default judgment is discretionary rather than mandatory. In deciding whether to enter a default judgment, the court should take into account the factors utilized by the federal courts, including: whether the default is largely technical and the defendant is now ready to defend; whether the plaintiff has been prejudiced by the defendant's delay in responding; and whether the court would later set aside the default judgment under Rule 55(c).

The standard in amended Rule 55(c) for setting aside a default is taken from Federal Rule of Civil Procedure 60(b), which is made applicable in the default judgment context by Federal Rule 55(c), and should be interpreted in accordance with federal case law. Under former Rule 55(c), a default judgment could be set aside only upon a showing of "excusable neglect, unavoidable casualty, or other just cause." The amended rule, however, adopts a more liberal standard. Under subdivision (c)(1), for example, a default judgment may be set aside on the basis of "mistake, inadvertence, surprise, or excusable neglect." In addition, subdivision (c)(4) permits the court to set aside a default judgment "for any other reason justifying relief from the operation of the judgment." The amended rule also makes plain that a defendant seeking to set aside a default judgment must show a meritorious defense, unless the judgment is void. This requirement is consistent with federal practice, see C. Wright & A. Miller, *supra* 2697, and with Arkansas case law. E.g., *Wilburn v. Keenan Companies, Inc.*, 298 Ark. 461, 768 S.W.2d 531 (1989). It should also be noted that Rule 55(c) is the exclusive basis for setting aside a default judgment. As amended in 1990, Rule 60 does not apply to default judgments.

New subdivision (f) provides a "grace period" after a case that has been removed to federal court is remanded to the state court. During this period, a default judgment cannot be entered and the defendants "may move or plead as they might have done had the case not been removed."

Addition to Reporter's Notes, 1999 Amendment: - Subdivision (a) has been amended by replacing the word "appear" with the word "plead," the terminology used in the corresponding

federal rule. This revision, while minor, is intended to eliminate potential confusion stemming from the fact that appearance is also relevant under subdivision (b), which requires notice of a hearing on a motion for default judgment if the party against whom the judgment is sought "has appeared in the action"

In addition, use of the word "plead" in subdivision (a) indicates that the phrase "otherwise appear" has independent meaning. Arkansas cases suggest that this phrase means the same thing as an appearance, in which case it would be a redundancy. E.g., *Tapp v. Fowler*, 291 Ark. 309, 724 S.W.2d 176 (1987) (defendant appeared or otherwise defended within meaning of Rule 55(a) by filing motion to dismiss and motion for summary judgment). Under the federal rule, the phrase "otherwise defend" refers to motions, which by definition are not pleadings. E.g., *Bass v. Hoagland*, 172 F.2d 205 (5th Cir.), cert. denied, 338 U.S. 816 (1949). See also Ark. R. Civ. P. 7(a) & (b) (distinguishing pleadings and motions). Amended subdivision (a) reflects the dichotomy recognized by the federal courts.

Addition to Reporter's Notes, 2003 Amendment: - Subdivision (c)(3) of the rule has been amended by inserting a parenthetical phrase, "whether heretofore denominated intrinsic or extrinsic," after the word "fraud." Although the prior version of the rule was not by its terms limited to extrinsic fraud, the Court of Appeals has construed it in that fashion. *Graves v. Stevison*, 98 S.W.3d 848 (Ark. App. 2003). The amendment has the effect of overturning *Graves* and makes subdivision (c)(3) consistent with Rule 60(c)(4).

Addition to Reporter's Notes, 2004 Amendment: - Subdivision (f) has been rewritten to modify and clarify the practice when a case is removed to federal court and then remanded. A corresponding change has been made in Rule 12(a). These amendments are based on a Texas rule, see Tex. R. Civ. P. 237a, and a similar approach has been taken in other states as well.

Under the original version of subdivision (f), a defendant had a 10-day grace period during which file an answer or Rule 12 motion after a removed case was remanded to state court. Even if the defendant had so responded to the complaint while the case was pending in federal court after its removal, he or she was required to file another answer or motion in circuit court to avoid a default judgment. See *NCS Healthcare v. W.P. Malone, Inc.*, 350 Ark. 520, 88 S.W.3d 852 (2002).

Amended Rule 12(a)(3) expands the grace period to 20 days, during which time a defendant who filed neither an answer nor a Rule 12 motion in the federal court must take such action in the state court. By contrast, if the defendant responded to the complaint in federal court while the case was pending there, Rule 55(f) prohibits entry of judgment by default upon remand. Consequently, the defendant need not respond again in circuit court, within the 20-day period, to avoid such a judgment. See *Laguna Village, Inc. v. Laborers International Union*, 672 P.2d 882 (Cal. 1983); *Banks v. Allstate Indemnity Co.*, 757 N.E.2d 776 (Ohio App. 2001).

Because Arkansas procedural rules differ in some respects from those in the federal courts, however, Rule 55(f) does not require the circuit court to adopt the documents filed in federal court for all purposes. See *Laguna Village*, *supra*. For example, the plaintiff may move for an order from the circuit court directing the defendant to revise his or her answer to conform to the Arkansas pleading rules. In addition, the "bulk filing" of the federal pleadings and motions in the circuit court will not suffice. Rather, a party relying on a pleading or motion filed in federal court is charged with the responsibility of making the circuit court aware of the filings and must, if challenged, be able to show that the document was served on the other party.

NCS Healthcare, supra; Banks, supra.

History Text:

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Associated Court Rules:

Rules of Civil Procedure

Group Title:

VII. Judgment

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